No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICI CURIAE* THE ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY, THE AMERICAN JEWISH CONGRESS, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR WOMEN POLICY STUDIES, THE FRATERNAL ORDER OF POLICE, THE HUMAN RIGHTS CAMPAIGN FUND, THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL GAY AND LESBIAN TASK FORCE, THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES, THE POLICE EXECUTIVE RESEARCH FORUM, THE SOUTHERN POVERTY LAW CENTER, AND THE UNION OF AMERICAN HEBREW CONGREGATIONS, IN SUPPORT OF PETITIONER

DAVID M. RAIM
Counsel of Record for *Amici Curiae*
KENNETH R. PIERCE
MEAGHAN MCGRATH
CHADBOURNE & PARKE
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
202-289-3000

OF COUNSEL:

RUTH L. LANSNER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
MICHAEL LIEBERMAN
MICHAEL A. SANDBERG
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017

ROBERT H. FRIEBERT
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East - Suite 1250
330 East Kilbourn Avenue
Milwaukee, WI 53202

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

62 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

INTEREST OF THE *AMICI CURIAE*

A. The Anti-Defamation League

The Anti-Defamation League ("ADL"), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." For almost 80 years, ADL has been active in the fight against discrimination in employment, housing, education, and public accommodations. ADL also believes very strongly that the First Amendment embodies core civil rights that are essential to ADL's ultimate purpose.

In 1981, after three consecutive years in which ADL's annual audit of anti-Semitic incidents revealed a dramatic increase in anti-Semitic violence nationwide, ADL developed a program designed to counteract anti-Semitic and racist hatred and violence. Media exposure, education, and more effective law enforcement are important features of the campaign. The cornerstone of ADL's program, however, is the staunch support of legislation providing enhanced penalties for certain crimes when they are committed by reason of the victim's actual or perceived race, religion, sexual orientation, or national origin. ADL has a keen interest in *State v. Mitchell*, Case No. 92-515, because the statute set aside by the Supreme Court of Wisconsin was based on a model bill drafted by ADL's Legal Affairs Department and first published by ADL in 1981.[1]

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[1] ADL's Model Bill as revised in 1988 provides as follows:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ___ of the Penal Code (insert code provision

The *Mitchell* decision, which improperly relies upon *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 112 S. Ct. 2538 (1992), has cast doubt, not only on similar penalty enhancement statutes now in effect in 25 other states and the District of Columbia, but also on proposed federal hate crime legislation presently under consideration in Congress. ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty enhancement hate crime legislation, in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin law.

B. Additional Amici Curiae

The following organizations, listed alphabetically, join the ADL as *Amici Curiae* in urging the Court to reverse the decision by the Wisconsin Supreme Court in *Mitchell*. The interests of each such organization in this case are provided in Appendices A - O hereto:

Appendix	Organization
A	People for the American Way
B	The American Jewish Congress
C	The Center for Constitutional Rights
D	The Center for Women Policy Studies
E	The Fraternal Order of Police
F	The Human Rights Campaign Fund

for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a ___ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

As explained further herein, in order to ensure that ADL's Model Bill did not run afoul of the First Amendment, ADL utilized language from various civil rights statutes which had been upheld as constitutional.

G	The International Association of Chiefs of Police
H	The National Council of Jewish Women
I	The National Gay and Lesbian Task Force
J	The National Institute Against Prejudice & Violence
K	The National Jewish Community Relations Advisory Council
L	The National Organization of Black Law Enforcement Executives
M	The Police Executive Research Forum
N	The Southern Poverty Law Center
O	The Union of American Hebrew Congregations

SUMMARY OF THE ARGUMENT

The Court's decision in this case will affect much more than § 939.645 of the Wisconsin laws. Forty six states have now enacted some form of hate crime legislation, more than half of them based upon the penalty enhancement approach employed in the Wisconsin law.[2] Proposed federal penalty enhancement legislation is also under consideration in Congress.

Through these laws, legislatures throughout the country are attempting to address a serious and growing problem. The potential impact on society of bias-motivated crimes at large is grave. These crimes tear at the fragile bonds that hold together America's diverse and pluralistic society. They heighten tension, anxiety and feelings of helplessness in entire communities. Recent events in Los Angeles and other cities dramatically illustrate the potential for individual incidents to erupt into widespread disturbances and riots.

Each of the *Amici* is unyielding in its commitment to the First Amendment; each is acutely aware that the war

[2] Appendix P hereto itemizes for the Court's convenience citations to the 26 state statutes based on the penalty enhancement approach.

against racial hatred and religious intolerance must be waged in a manner that neither threatens nor impinges upon First Amendment freedoms. *Amici* firmly believe, however, that the penalty enhancement law at issue in this case addresses the problem in a manner that comports fully with the Constitution.

The Wisconsin law punishes a particularly heinous type of conduct; it does not punish thoughts or speech. In structure and in effect, the Wisconsin statute is no different from other antidiscrimination laws, the constitutionality of which have been repeatedly upheld. To the extent that motive plays a part in the penalty enhancement process, the Wisconsin law is no different from longstanding state laws and procedures (and the federal Sentencing Guidelines) under which motive is an important and well established aggravating or mitigating factor in sentencing. Properly construed and applied, the Wisconsin law does not create any "chilling effect."

ARGUMENT

I. HATE CRIMES ARE A NATIONAL PROBLEM

In a suburb of Washington, D.C., two white men assault a black woman walking toward a shopping mall, rip off her clothes, douse her with lighter fluid and, yelling "nigger," threaten to set her on fire.[3] In the Crown Heights neighborhood of Brooklyn, New York, a mob's cries of "Kill the Jew" echo through the streets before a 29-year-old Jewish scholar is stabbed to death.[4] In Kentucky, a group of assailants beat a young gay man with a tire iron and lock him in a car trunk full of snapping turtles, leaving

[3] Twomey, Steve, *A Night of Hate in Wheaton*, Washington Post, March 5, 1992.

[4] On the night of August 19, 1991, following the tragic accidental death of a black child in an automobile mishap, a group of young rioters stabbed Yankel Rosenbaum, who died later in a local hospital.

him with severe brain damage.[5] A riot erupts in Los Angeles, California after four white police officers are acquitted of illegally beating a black motorist, and, in the midst of the chaos, a group of black rioters pulls a white motorist from his truck and viciously beats him. A young black man is struck by a car and murdered after a gang of young white men chase him onto a highway in a Queens, New York neighborhood called Howard Beach.

Like a recurring nightmare, Americans in every part of the country have awakened to these and a host of similar headlines in the past few years. And unfortunately, the racial, ethnic and anti-homosexual motivated crimes that make the headlines are but the tip of the iceberg of a national problem. Less publicized are the thousands of less sensational incidents of assault, battery, threats and vandalism prompted by the same animus.

A. The Scope of the Problem

ADL has been closely tracking one type of bias-motivated incident—anti-Semitic violence and vandalism—since 1960. ADL began publishing in 1979 an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. The Audits conducted over the first three years revealed a substantial increase in anti-Semitic vandalism and violence. From 1982 to 1986, ADL's Audits revealed a general downward trend in such incidents. Suddenly, in 1987, the number of anti-Semitic incidents began to spiral upward. There was a 17% increase in anti-Semitic incidents in 1987 over 1986. For the next five years, the upward spiral continued, culminating in 1991 with the highest total ever reported to ADL—1,879 separate incidents of anti-Semitic violence, vandalism and harassment reported from 42 states and the District of Columbia.

[5] Peirce, Neal R., *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States.

The reported incidents included several fire-bomb and arson attacks on synagogues in California, Jewish cemetery desecrations in nine states and hundreds of assaults throughout the country. Most disturbing was the fact that for the first time since the Audits began, there were more attacks on Jewish individuals than against synagogues and property. The number of physical assaults in 1991 was double the number reported in 1990.

Hate crimes focused on other minorities are also on the rise. Recently, the United States Conference of Mayors sent a survey on hate crimes to over 1,000 cities. Between 1990 and 1991, incidents of hate violence increased in 36% of the responding cities and remained the same in 58%. Only 6% of the responding cities reported a decrease.[6] Data collected pursuant to various states' hate crime reporting regulations indicate a dramatic increase in hate crimes between 1990 and 1991 in Connecticut, Massachusetts and New Jersey, with Florida also reporting a rise. *Amicus Curiae* the National Gay and Lesbian Task Force reported 7,031 incidents of anti-homosexual violence in 1989.[7] A recent report revealed a 31% increase in attacks on gay and lesbian individuals in each of five major metropolitan areas in 1991 over 1990.

Recently, the FBI published the first data compiled pursuant to the federal Hate Crimes Statistics Act of 1990. Despite the fact that only 32 states supplied information, a total of 4,558 hate crime incidents were reported by nearly 3,000 law enforcement agencies to have taken place in 1991. Racial bias was by far the most frequent motive

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[6] *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities*, United States Conference of Mayors, Anti-Defamation League, June 1992.

[7] *Anti-Violence Project, National Gay and Lesbian Task Force, Anti-Gay Violence, Victimization and Defamation in 1989* (1990). See also, Note, *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1541-42 (1989).

(60%) of the reported offenses, followed by religious bias, ethnic bias and sexual-orientation bias.[8]

B. The Severity and Community Impact of Bias-Motivated Crimes

The conduct targeted by the legislation at issue in *Mitchell* is distinct from other criminal behavior. These are not incidents where a victim is coincidentally the member of a group different from the criminal's, or where the criminal—in the course of a burglary or a mugging—realizes his victim's status and utters a racist or anti-Semitic remark. These crimes occur *because* of the victim's actual or perceived status; where race, religion, ethnicity or sexual orientation is the *reason* for the crime. In the vast majority of these cases, but for this personal characteristic, no crime would occur.

Research on bias-motivated crimes is in its infancy, but the available evidence indicates that these crimes are generally much more violent and have a significantly greater community impact than other crimes. One researcher, for example, analyzed 452 hate crime cases in Boston during the period between 1983 and 1987 (the "McDevitt Study").[9] The data revealed that 74% of bias-motivated assault incidents (including assault and battery and assault with a dangerous weapon) involved some physical injury to the victim. The national figure for all assault cases was 29% (Bureau of Justice Statistics, 1985). Remarkably, these bias-motivated assault incidents involved hospitalization of their victims over four times more often than is the case with other assaults.[10]

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[8] Federal Bureau of Investigation Press Release, January 5, 1993.

[9] McDevitt, Jack, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983 - 1987)*, Center for Applied Social Research, Northeastern University (1989).

[10] *Id.* at 7.

Amicus Curiae the National Institute Against Prejudice and Violence conducted in 1989, the first national study of the prevalence and impact of psychological and physical violence motivated by prejudice ("ethnoviolence") in the general population. The findings of this study, based upon telephone interviews completed with 2,078 people in a stratified random sample of the contiguous United States, showed that at least 7% of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. Victims of ethnoviolence suffered, on average, 21% more of the standard psychophysiological symptoms of stress than did victims of similar acts of ordinary violence or abuse.

The impact of bias-motivated crimes on the larger community is grave. These crimes not only heighten the general feeling of vulnerability, but also directly intimidate the entire segment of the community with which the victim is identified, making large sections of the population feel unprotected by the law. These crimes cleave at the delicate bonds that hold together America's diverse communities, provoke retaliation and lawlessness, and perpetuate a cycle of fear and mistrust between these communities. As Justice Stevens notes in his concurring opinion in *R.A.V.*:

> One need look no further than the recent social unrest in the Nation's cities to see that race-based threats cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order.

112 S.Ct. at 2570, n. 9.

II. PENALTY ENHANCEMENT LEGISLATION IS AN ESSENTIAL WEAPON IN THE FIGHT AGAINST BIAS-MOTIVATED VIOLENCE

Clearly, hatred cannot be legislated out of existence. The long term solution to bigotry is education and experience. Without a doubt, however, legislation that increases the penalty for bias-motivated crimes has been a powerful tool in the nationwide campaign against hate violence and vandalism.

First, the penalty enhancement concept allows society to redress a unique type of wrongful conduct in a manner that reflects that conduct's seriousness. Bias-motivated crimes have a more serious potential impact on the wider community than do other crimes. It is within the power of government to give such crimes the special treatment that they deserve. This Court has noted with approval the theory in criminal sentencing that "the punishment should fit the crime" and that "the true measure of crimes is the injury done to society." *See Payne v. Tennessee*, __ U.S. ___, 111 S.Ct. 2597, 2605 (1991). As the Supreme Court of Oregon aptly explained in its recent decision upholding the Oregon hate crime law and specifically disagreeing with *Mitchell*,

> Such [bias motivated] crimes—because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member—invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived

> to be possessed by the victim, that have historically been targeted for wrongs. *Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.*

State v. Plowman, 838 P.2d 558, 563 (1992) (emphasis added).

Second, the Wisconsin statute and similar statutes also ensure that targeted groups perceive that law enforcement officials take their concerns seriously. By enforcing these laws, an isolated incident is less likely to create anxiety in the wider community; the potential for an incident to erupt into a widespread disturbance is minimized.

Third, law enforcement authorities believe these laws can have a deterrent effect by making clear that hate crimes will be considered particularly serious crimes and will be dealt with accordingly. While there have been no empirical studies on the point, law enforcement officials have recognized the potential deterrent effect of hate crime laws. For example, when it became apparent that large segments of the population mistakenly believed that the Court's decision in *R.A.V.* vitiated all hate crime laws, Chicago's Police Superintendent, the United States Attorney, the Cook County State's Attorney and several other Chicago law enforcement officials considered it necessary to hold a rare and widely publicized press conference to underscore the fact that there was no "window of opportunity" for bigots.[11]

For these reasons, there is no question that the State of Wisconsin has legitimate and compelling bases for the enactment and prosecution of its penalty enhancement law.

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[11] Sandberg, Michael A., *No Window of Opportunity for Bigots*, ADL On the Frontline, September 1992, at 5.

III. THE WISCONSIN LAW COMPORTS WITH THE FIRST AMENDMENT

At the time of Mitchell's crimes, the Wisconsin law provided for penalty enhancement if the defendant committed one of several enumerated offenses and "intentionally select[ed] the person against whom the crime" was committed or "select[ed] the property which [was] damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." § 939.645 (Wisc. Stats.) The Wisconsin Supreme Court held the statute to be unconstitutional on two grounds: First, the "statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." Second, it "violates the First Amendment indirectly by chilling free speech." *State v. Mitchell*, 485 N.W.2d 807, 811 (1992). The Wisconsin Court is wrong on both counts.

A. THE WISCONSIN LAW DOES NOT PUNISH THOUGHTS OR SPEECH; IT PUNISHES THE ACT OF INTENTIONAL SELECTION BECAUSE OF THE VICTIM'S STATUS.

According to the Wisconsin Supreme Court, the Wisconsin statute punishes "thought" because it "punishes the 'because of' aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection." *Id.* at 812. This is because "an examination of the intentional 'selection' of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime." *Id.* at 813.

As is discussed further below, to the extent that the offender's "motive" or "purpose" is relevant to the inquiry, the Wisconsin statute is typical of many state laws and procedures. Also, under the federal Sentencing Guidelines, "motive" or "purpose" are legitimate, significant

and well established aggravating or mitigating factors in determining a defendant's appropriate punishment. The principal flaw in the Wisconsin Court's analysis, however, is its assumption that the punishment of an act prompted by certain thoughts is punishment of the thoughts themselves. As Justice Bablitch explains in his dissent,

> The penalty enhancement statute is directed at the action or conduct of selecting a victim .... The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive. ... The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

Mitchell, 485 N.W.2d at 821 - 822 (Bablitch, J., dissenting).

A New York court reached the same conclusion in upholding New York's penalty enhancement law:

> The statute does not attempt to prohibit bigotry itself. The individual's freedom to think, and indeed, speak, publish or broadcast views on the subjects of race, religion or ethnicity are not regulated by this law. Violent conduct is what is being regulated.

People v. Grupe, 532 N.Y.S.2d 815, 818 (N.Y.City Crim.Ct.1988). *See also People v. Miccio*, 589 N.Y.S.2d 762 (N.Y.City Crim.Ct. 1992) (distinguishing New York penalty enhancement law from St. Paul ordinance invalidated in *R.A.V.*).

While the right to think, believe and speak one's thoughts is at the core of the First Amendment, *actions* based on these beliefs have never been accorded the same range of protection from government regulation. As this Court recently emphasized in *R.A.V.*:

> Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 112 S.Ct. at 2546-47. It has never seriously been questioned that the First Amendment does not prohibit laws which proscribe violent conduct even if such conduct is directly based upon a philosophy, religion or set of abstract beliefs. "Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

Nowhere is the flawed reasoning of the *Mitchell* opinion more apparent than in the Wisconsin Court's strained and confusing effort to distinguish the Wisconsin law from other antidiscrimination laws. The Wisconsin Court asserts that "under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the 'selection' which is punished is not an act, it is a mental process." *Mitchell*, 485 N.W.2d at 816. According to the Wisconsin Court, while antidiscrimination laws involve "objective acts of discrimination," the penalty is enhanced under the Wisconsin hate crimes statute "because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act." *Id.* at 817.

This reasoning makes no sense. It certainly is an insufficient basis to set aside a law of such urgency and importance. If the Wisconsin statute is unconstitutional, then the nation's body of other antidiscrimination laws are also constitutionally suspect. In virtually all of the federal antidiscrimination laws, the prohibited action is the *selection* of a person or group for differential treatment "because of" his or her status. In language, structure and application, the Wisconsin law and most of the nation's

antidiscrimination laws are completely analogous.[12] Under the Wisconsin law, the penalty is enhanced where the victim is intentionally selected "*because of*" his or her race, religion, color, disability, sexual orientation, national origin or ancestry. Similarly, Title VII, as amended by § 2000e-2(a)(1), prohibits various employment actions "*because of*" the employee or prospective employee's race, color, religion, sex or national origin. 42 U.S.C. § 3604 prohibits interference with housing choices "*because of* [the victim's] race, color," or other listed status.[13] Under the Wisconsin penalty enhancement law and these antidiscrimination laws, it is the act of discrimination that is proscribed. As Justice Bablitch notes in his dissent, "both sets of laws involve discrimination, both involve victims, both involve action 'because of' the victim's status."

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?[14]

Mitchell, 485 N.W.2d at 820 (Bablitch, J., dissenting).

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[12] Indeed, ADL's Legal Affairs Department employed the language and structure of federal and state antidiscrimination laws in drafting in 1981 the Model Bill upon which the Wisconsin law is based.

[13] The constitutionality of antidiscrimination laws has repeatedly been upheld. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activity that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"). *See also Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

[14] Similarly, in his testimony before the House Subcommittee on Crime and Criminal Justice (during its consideration of the constitutionality of the proposed House Bill on hate crimes), Professor Laurence Tribe noted: "If *R.A.V.* were to cast a constitutional shadow over the Hate Crimes Sentencing Enhancement Act, precisely the same shadow would befall this entire corpus of antidiscrimination law."

In a footnote, the Wisconsin Court hints that it believes there were two other "distinctions" between the Wisconsin penalty enhancement law and other antidiscrimination laws:

> We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

Mitchell, 485 N.W.2d at 817, n. 21

This reasoning is doubly wrong. Penalty enhancement hate crime legislation is no more concerned with motive and no less concerned with conduct than other antidiscrimination laws.[15] And to rest so important a point on a presumed distinction between "redressing" and "punishing" begs the question. "Punishment" *is* a form of "redressing;" to say that it is permissible to consider motive when "redressing" conduct, but impermissible where society "punishes" for the same conduct is word play. It is also incorrect, for criminal penalties *do* attach to certain antidiscrimination law violations. *See e.g.*, 18 U.S.C. § 242 ("Whoever, under color of any law, . . . willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution . . . on account of such inhabitant being an alien, or by reason of his color, or race . . . shall be

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[15] Indeed, "motive," as such, is an *explicit* element in certain antidiscrimination offenses. Title VII, for example, provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m) (emphasis added). *See also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3) requires "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action").

fined not more than $1,000 or imprisoned not more than one year, or both . . .").[16]

In sum, under the penalty enhancement approach, it is criminal conduct that is sought to be "suppressed," not the ideas or philosophies that prompt hate crimes or the utterances that may accompany such crimes. As the Court acknowledged in *R.A.V.*, "We have long held . . . that [even] nonverbal expressive activity can be banned because of the action it entails . . . ." *R.A.V.*, 112 S. Ct. at 2544.

B. THE FIRST AMENDMENT DOES NOT PROHIBIT THE ENHANCEMENT OF PUNISHMENT BECAUSE OF A BIAS MOTIVE.

While it is the act of intentional selection that is punished under the Wisconsin statute, *Amici* do not contend that the defendant's "motive" or "purpose" is irrelevant to the inquiry. There is little question that prosecutors, in seeking to prove "intentional selection" of the victim because of his or her status under the Wisconsin law and similar statutes, may introduce evidence regarding the defendant's motives. The Wisconsin Court thinks that this

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[16] It should be noted that numerous other state and federal criminal laws provide for penalty enhancement depending upon the victim's special status. In Wisconsin, for example, there is penalty enhancement if the victim of a battery is over 61 years of age or is disabled. § 940.19 (Wisc. Stats.) Although the analogy between these laws and the Wisconsin hate crimes statute is not as close as that between the antidiscrimination laws and the Wisconsin statute, they demonstrate that criminal penalties are often enhanced where a crime involves certain types or categories of victims, even if the victim is intentionally selected because of a belief or a philosophy which itself is protected by the First Amendment. A Presidential assassin would be subject to the enhanced penalties provided under 18 U.S.C. § 1751 (Presidential and Presidential staff assassination, kidnapping and assault) whether or not he selected his victim as a result of a political philosophy or set of purely abstract beliefs. As Justice Abrahamson notes in her dissent in the *Mitchell* case, "The state has legitimate, reasonable and neutral justifications for selective protection of certain people." 485 N.W.2d at 818.

not only violates the First Amendment, but that it is also anathema to basic principles of criminal law. The Wisconsin Court asserts that "because all of the crimes [for which penalties are enhanced] are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights." *Mitchell*, 485 N.W.2d at 812. In admonishing that "intent and motive should not be confused," the Wisconsin Court makes the startling assertion that, "[c]riminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so." *Id.*

This is simply not so. Criminal law is intimately concerned with "motives" and with "a person's reasons for committing crimes." It must not be forgotten that the Wisconsin statute is a penalty enhancement statute. In enacting the law, the Wisconsin legislature merely provided that *sentences* and other *punishment* for certain crimes can be increased because of intentional selection of certain victims. This Court recently emphasized that "the sentencing authority has always been free to consider a wide range of relevant material." *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992), *quoting Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991). *See also United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"). It is hornbook law that "motives," as such, play a crucial role in determining sentences and the appropriate punishment in criminal cases:

> Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good mo-

> tives, or a rather high sentence because of his bad motives.[17]

One need look no further than the federal Sentencing Guidelines to appreciate the pivotal role of "motive" in sentencing. For example, under § 2A2.2(b)(4) ("Aggravated Assault"), the sentence is increased by two levels if an "assault was *motivated* by a payment or offer of money or other thing of value" (emphasis added). Under § 2G3.1 ("Importing, Mailing, or Transporting Obscene Matter"), the base level is increased "if the offense involved an act related to distribution *for pecuniary gain*." (emphasis added). Under § 2Q2.2 ("Lacey Act: Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants"), the base level is increased by two levels "if the offense involved *a commercial purpose*." (emphasis added). These and other provisions of the Sentencing Guidelines are "penalty enhancement" provisions based upon the defendant's "motives."

Moreover, the Wisconsin Court, and the article upon which it bases its discussion of "intent," "motive" and "purpose,"[18] are mistaken that "motive cannot be a criminal offense or an element of an offense." *Mitchell*, 485 N.W.2d at 813, n. 11. There are, in fact, many crimes in which "motive" is an element of the offense. As one commentator explains:

> If a legislature wishes to treat in a special way acts done from a particular motive, it may incorporate the motive in the definition of the offense by a special use of the term *intent*. If murder for money or for vengeance is to be sin-

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[17] LeFave, Wayne R., Scott, Austin, W., *Criminal Law* (2d Ed. 1986) at 231.

[18] Gellman, Susan, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 331 (1991).

> gled out, the proscribed act may be "causing the death of a person with intent to profit financially thereby" or "with intent to avenge the death of another." Here the phrase "with intent to" signals the pursuit of an interest as the purpose of the act. It designates a *motive* rather than a *harm* as a required element of the crime, and so the phrase is used in a different way than when specific intent is designated.[19]

The Wisconsin Court seems troubled by the fact that the penalty enhancement is embodied in legislation rather than left to the discretion of the judge: "Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." *Mitchell*, 485 N.W. 2d. at 815, n. 17.

The Wisconsin Court clearly misreads the Wisconsin law. The section of the Wisconsin statute under which Mitchell was sentenced gives the judge complete discretion on whether the penalty should be enhanced and, if so, by how much (up to the maximum). Section 939.645(2)(c) of the Wisconsin laws provides that if the crime is a felony, "the maximum prescribed by law for the crime *may* be increased by not more than $5,000 and the maximum period

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[19] Gross, Hyman, *A Theory of Criminal Justice* (1st Ed. 1979) at 112. As an example of "the two different uses of intent" (*i.e.*, as "motive" and as "specific intent"), Professor Gross cites to the New York Penal Law definition of kidnapping in the first degree. "That offense is constituted by abducting another person when (among other things) the abductor's intent is to compel payment of a ransom by a third person; or when the abductor's intent is to inflict physical injury on, or sexually abuse, the victim. It seems clear that the first of these alternative intent requirements is not a specification of harm but of *motive*." (emphasis added).

of imprisonment prescribed by law for the crime *may* be increased by not more than 5 years." (emphasis added).

Further, since the end result of both a judge-imposed and a legislature-imposed penalty for a hate crime is an enhanced sentence, the Wisconsin Court's argument is a distinction without a difference. Effectively, the Wisconsin legislature increased the maximum punishment for each of the underlying felonies by 5 years, but provided that the offender shall not be sentenced for any portion of the upper 5 years of the maximum period unless the victim was intentionally selected because of his or her race, religion, color, disability, sexual orientation, national origin or ancestry. As this Court acknowledged in *Mistretta v. United States*, 488 U.S. 361, 364 (1989), "historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government. Congress, of course, has the power to fix the sentence for a federal crime, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control." There is simply no constitutional infirmity in including in a statute a penalty enhancer based on a particular motive.

The question, then, is not whether the Wisconsin statute is unconstitutional because it enhances penalties based on "motives" *per se*, but whether it is unconstitutional in enhancing punishments based on the offender's bias motive—his or her intentional selection of the victim because of some animus tied to the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. This Court has already twice answered that question in the negative. In *Barclay v. Florida*, 463 U.S. 939 (1983), the defendant set out to kill white persons indiscriminately in order to start a race war, and murdered a white hitchhiker. In imposing the death sentence, the trial court discussed (among other aggravating factors) the racial motive

for the murder. This Court rejected the argument that it was improper to take into account the defendant's racial motive in imposing capital punishment. *Id.* at 950.

The Court returned to the same point more recently in *Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093, 1097 (1992). At sentencing, the trial judge admitted evidence that the defendant was a member of the Aryan Brotherhood, a prison gang with white supremacist beliefs, and the jury recommended the death penalty. This Court reversed the lower court's imposition of the death sentence because any racists beliefs that the Aryan Brotherhood might hold could not be tied in any way to the murder (Dawson and his victim were both white). The evidence thus proved only Dawson's abstract beliefs, and was not a proper aggravating factor. The Court made clear, however, that had Dawson's racist beliefs motivated or prompted the murder, the admission of evidence regarding those beliefs would *not* constitute a First Amendment violation:

> [T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Id. at 1097.

The Court specifically reaffirmed the holding in *Barclay* that evidence of a defendant's beliefs and associations, including racist beliefs and associations, can be relevant and admissible in sentencing, so long as such evidence is tied in some way to the subject crime. *Id.* at 1098.

In sum, the conclusion reached by the Wisconsin Court regarding the role of "motives" in criminal law is clearly incorrect. The First Amendment does not prohibit the enhancement of punishment because of a bias motive.

C. PROPERLY CONSTRUED AND APPLIED, THE WISCONSIN LAW HAS NO "CHILLING EFFECT"

As noted above, the Wisconsin Court's second ground for setting aside the Wisconsin law was its presumed "chilling effect." As the Wisconsin Court explains:

> [O]f course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech.

Mitchell, 485 N.W.2d at 816.

This at best merely exaggerates what may occur if the Wisconsin statute is misapplied or misinterpreted. The argument disintegrates into senseless hyperbole when the Wisconsin Court quotes Ms. Gellman's article (*See* n. 18 above): "Anyone charged with one of the underlying offenses could . . . face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas . . . ." *Id.* at 816, *quoting* Gellman, 39 U.C.L.A. L. Rev. at 360.

The Wisconsin penalty enhancement law will not lead to self-censorship, habitual or otherwise; there will be no detrimental effect on either the marketplace of ideas or the nation's considerable body of ethnic jokes. A statute is unconstitutionally overbroad if it sweeps protected First Amendment speech within its reach and thereby chills free speech. *See, e.g., Gooding, Warden* v. *Wilson*, 405 U.S. 518, 522 (1972); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). The notion that bigots and racists will refrain from exercising their First Amendment rights because some day, if they commit a crime, their penalty may be enhanced,

is simply absurd. Moreover, there are several safeguards which ensure that, if the statute is properly applied and interpreted, defendants will not be punished for holding or expressing unpopular or offensive beliefs and will *only* be punished if they *intentionally select* their victims because of their victims' status.

First, a defendant for whom the prosecutor seeks an enhanced penalty is afforded far greater procedural safeguards under the Wisconsin law than without it. As discussed above, in the typical sentencing hearing, the rules of evidence are relaxed and the judge is allowed to consider a wide variety of factors bearing on the defendant's motives and character. Under *Dawson* and *Barclay*, bias motive can be introduced if it is tied to the crime. Under the Wisconsin law, however, the penalty can only be enhanced if the "intentional selection" of the victim "because of" his or her status is proven to the trier of fact *beyond a reasonable doubt*. Indeed, the Wisconsin statute requires the court to direct that the trier of fact find a *special verdict* as to whether the victim was intentionally selected because of one of the listed characteristics. § 939.645(3) (Wisc. Stats.).

Further, the Wisconsin Court fails to appreciate that the "beyond a reasonable doubt" evidentiary standard, combined with the requirement that the victim be selected "*because of*" his or her status, provides a potent safeguard against both the introduction of non-probative evidence and the possibility of punishment for holding offensive or unpopular beliefs. To satisfy the requirements of the statute (and the holding in *Dawson*), there must, in short, be a "tight nexus" between the evidence and the crime. Such evidence must be part of the chain of cause and effect leading to the crime, and is typically contemporaneous with the crime. The *Barclay* case, in which the defendant's membership—at the time the murder was committed—in a group whose avowed purpose was to kill white persons in order to start a revolution and a race war, is an example

of the type of nexus that is required. Justice Abrahamson, in her dissent in *Mitchell*, makes this point:

> In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. . . . . The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime. Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Mitchell, 485 N.W.2d at 818 - 19 (Abrahamson, J., dissenting).

Moreover, the relevancy rules referred to by the Wisconsin Court are extremely important additional safeguards that must be taken into account. For example, § 904.03 (Wisc. Stats.) provides for the exclusion of evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Section 904.04(c) (Wisc. Stats.) bars the introduction of evidence of a person's character or traits to prove action in conformity therewith on a particular occasion.[20] As Justice Abrahamson observes:

> To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a

[20] *See also* Federal Rules of Evidence 403 and 404.

> person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime.

Mitchell, 485 N.W.2d at 819 (Abrahamson, J., dissenting).

There is no question that speech evincing a proscribed intent or motive can be introduced to prove the existence of proscribed conduct. *See, e.g., Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965). For example, in antidiscrimination cases, impermissible motives are often proven by the defendant's statements. *See, e.g., Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (in proving a violation of Title VII, "stereotyped remarks can certainly be evidence that gender played a part" in a particular employment decision).[21]

The Wisconsin penalty enhancement statute is clearly not unconstitutional on its face. As to the possibility that it may be misapplied, there are potent safeguards which help ensure it will be applied in a manner consistent with First Amendment values and concerns. Further, the argument that courts may misapply the statute is simply insufficient:

> It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1983).

[21] *See also Milligan-Jensen* v. *Michigan Technological Univ.*, 767 F. Supp. 1403, 1413 (W.D. Mich. 1991) (defendant employer's remark that "you have the lady's job" is "the clearest direct evidence of [employer's] discriminatory intent").

Amici submit that any close examination of the Wisconsin statute and similar penalty enhancement laws will establish that "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. The governmental interest in enacting these crimes is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).[22] The law does not punish "speakers who express views on disfavored subjects," *R.A.V.*, or attempt to "drive certain ideas or viewpoints from the marketplace." *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, __ U.S. __, 112 S. Ct. 501, 508 (1991).

The defendant in this case suffered no deprivation of his First Amendment rights. The Wisconsin law, and similar penalty enhancement statutes based on ADL's Model Bill, leave racists and bigots free to think, speak, believe and express their views within the full range of permitted conduct under the First Amendment.[23]

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[22] Indeed, given the type of underlying crimes that must be committed to trigger the statute, it is unlikely that cases prosecuted under the Wisconsin penalty enhancement law will involve any expressive activity at all. This is in marked contrast to statutes like the flag-burning law invalidated in *United States v. Eichman*, 496 U.S. 310 (1990).

[23] In his concurrence in *O'Brien*, Justice Harlan observed that ultimately, the test under the First Amendment of a government regulation which may incidentally restrict expression but which furthers important governmental interests (and satisfies the Court's other criteria) is whether the regulation "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate." *O'Brien*, 391 U.S. at 388-89.

CONCLUSION

For the above reasons, *Amici Curiae* urge the Court to reverse the decision of the Supreme Court of Wisconsin and affirm the constitutionality of the Wisconsin law.

Respectfully submitted,

David M. Raim

DAVID M. RAIM
Counsel of Record for *Amici Curiae*
KENNETH R. PIERCE
MEAGHAN MCGRATH
CHADBOURNE & PARKE
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
202-289-3000

OF COUNSEL:

RUTH L. LANSNER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
MICHAEL LIEBERMAN
MICHAEL A. SANDBERG
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017

ROBERT H. FRIEBERT
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East - Suite 1250
330 East Kilbourn Avenue
Milwaukee, WI 53202

APPENDIX

APPENDIX A:

PEOPLE FOR THE AMERICAN WAY

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil liberties and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 300,000 members nationwide. People For has a broad concern for protecting First Amendment rights, and has submitted *amicus* briefs to this Court in support of free expression in a number of recent cases, such as *Forsyth County* v. *Nationalist Movement* and *United States* v. *Eichman*.

At the same time, the organization is devoted to promoting religious and racial tolerance and pluralism and to combating discrimination and prejudice. People For believes that the law at issue in this case is consistent with both these sets of objectives and represents a method of state regulation of discriminatory conduct, similar to numerous other antidiscrimination laws, which can be properly applied in a manner that fully comports with the First Amendment.

APPENDIX B:

THE AMERICAN JEWISH CONGRESS

The American Jewish Congress is an organization founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. It has long supported the use of the law, including the criminal law, to punish those who would discriminate against American citizens because of their race, religion, sex, sexual orientation, or national origin. Crimes in which the victim is selected because of these suspect grounds tear at the fabric of society. Such offenders must be treated and punished with utmost seriousness.

Because Wisconsin's penalty enhancement law is an important weapon in the war against violent bigotry, the American Jewish Congress joins in this brief.

APPENDIX C:

THE CENTER FOR CONSTITUTIONAL RIGHTS

The Center for Constitutional Rights (CCR) was created in 1966 by lawyers who were active in the civil rights movement. Through litigation and public education, CCR has continued to work to make meaningful constitutional, statutory, and international human rights. Among its cases, CCR has defended the First Amendment; fought bias-related violence by organized hate groups, individuals, or police; and supported hate crime legislation designed to protect people of color, religious minorities, women, Lesbians and Gay men, the differently abled and other marginalized groups targeted for violence.

The Center for Constitutional Rights joins with *Amici* to urge the Court to uphold the constitutionality of the Wisconsin hate crime legislation, which represents the attempts of local governments nationwide to oppose escalating violence against historically oppressed groups. If the Court fails to uphold this statute, which threatens no constitutionally protected expression, it will send the dangerous message that this society will tolerate bias-motivated brutality and it will signal a retreat from long-established legal and moral principles opposing discrimination. While the facts of this care are historically and currently atypical, the Court must take this opportunity to affirm a constitutionally sound and vitally necessary method of combatting the devastating harm and terror of bias-motivated crimes.

APPENDIX D:

THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies (the "CWPS") was established in 1972 as the first independent national public policy research and advocacy institute focused specifically on improving the social, legal, and economic status of women. Underlying all of the Center's work is the premise that sexism and racism must be addressed simultaneously. The Center looks at the impact of combined race-plus-sex bias on women of color, women from diverse socioeconomic backgrounds, women of diverse sexual identities, women with disabilities, and women of different ages. In 1991 the Center published a policy paper, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, and participated in coalitions and task forces on hate crimes and the Violence Against Women Act. In September, 1992 the CWPS convened a "Think Tank" to consider the efficacy and legitimacy of defining civil rights remedies for acts of hate violence against women. Based on our concern and interest for individual rights we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin law.

APPENDIX E:

THE FRATERNAL ORDER OF POLICE

The Fraternal Order of Police (FOP) is the nation's largest law enforcement organization; with over 240,000 members throughout the United States. Founded in 1915, the FOP represents professional, full-time officers from all agencies of law enforcement on the federal, state and local levels.

Through the years, the FOP has developed a proud tradition of leadership in national affairs and has a history of commitment to insuring that society as a whole is equally protected under the law.

The FOP believes that hate crimes deprive society of this equal treatment under the law and the nation's law enforcement has more than a mere duty to respond against this bias.

Assisting law enforcement in their endeavor to insure equal treatment under the law are statutes in certain states (31) that provide for penalty enhancement for violations of hate crimes laws. The FOP also believes these penalty enhancement statutes also serve as a deterrent to would-be violators.

The FOP believes that the question raised by the ruling in *State* v. *Mitchell* threatens the effective policing of hate crimes which is so important to the order of this nation.

APPENDIX F:

THE HUMAN RIGHTS CAMPAIGN FUND

The Human Rights Campaign Fund is the largest political organization representing gay and lesbian Americans. Hate crimes motivated by the sexual orientation of the victim are on the rise in many major American cities, and the National Institute of Justice has estimated that crimes against gay and lesbian Americans may be the largest category of hate crimes. The Human Rights Campaign Fund and the Americans it represents believe that government must have the tools, such as the law at issue in this case, to deal effectively with this growing problem.

APPENDIX G:

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

The International Association of Chiefs of Police (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its program of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

APPENDIX H:

THE NATIONAL COUNCIL OF JEWISH WOMEN

Founded in 1893, the National Council of Jewish Women ("NCJW") is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our "National Resolutions," which include working for "the enactment and enforcement of laws and regulations which protect individual rights and civil liberties", we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX I:

THE NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force ("NGLTF") is the oldest national gay and lesbian civil rights advocacy organization in the U.S. Since 1973, NGLTF has worked to eradicate prejudice, discrimination and violence based on sexual orientation and HIV status. Since 1984, NGLTF has noted in its annual audit of anti-lesbian and anti-gay incidents a steady rise in defamation, harassment, violence and attacks. NGLTF supports hate crimes penalty enhancement legislation as part of the overall effort to count and counter crimes which target individuals on the basis of their race, religion, creed, color, sex, national origin or sexual orientation.

NGLTF balances its interest in countering violence against lesbians and gay men with its interest in protecting First Amendment rights. NGLTF has been at the forefront of the fight to support the right of lesbians and gay men to speak their minds and publish their ideas. Indeed, NGLTF is acutely aware that bias violence abridges the First Amendment rights of its victims by making them afraid to assemble and organize.

It is out of these dual interests that NGLTF joins ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX J:

THE NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

The National Institute Against Prejudice & Violence ("NIAPV"), created in 1984, is the only national center dedicated exclusively to studying and responding to ethnoviolence—psychological and physical violence motivated by race, religion, ethnicity, sexual orientation or gender. While other organizations deal with selected aspects of these problems, NIAPV is unique in its comprehensive approach. NIAPV's landmark social science research is the foundation of training and educational programs addressing the causes and effects of ethnoviolent victimization in communities, schools and workplaces; cultural differences that cause intergroup tension; effective communication and conflict resolution; and the development of procedures for reporting and responding to incidents. NIAPV also acts as a clearinghouse of information on reported incidents of intergroup conflict and model programs of response; tracks the quantity and quality of news media activity; publishes reports and educational materials; and works for the enactment of appropriate legislation.

NIAPV's research clearly establishes both the pervasiveness of ethnoviolence as well as the greater traumatic impact of ethnoviolence on the victim. In a 1987 study of a college campus ("The UMBC Study") NIAPV found that 20 percent of all minority students experienced at least one act of ethnoviolence during the academic year studied. Numerous replications of The UMBC Study at campuses around the country, and analysis of other similar campus research, confirm the 20 percent figure as a conservative estimate of the number of minority students nationwide who are victims of ethnoviolence during an academic year. The traumatic effects of the victimization were found to be often serious and long-lasting.

In 1989, pursuant to a grant from the Ford Foundation, NIAPV conducted the first national study of the prevalence and impact of ethnoviolent victimization in the general population ("The National Victimization Survey"). The findings of this study, based upon telephone interviews completed with 2,078 people in a stratified random sample of the contiguous United States, showed that at least 7 percent of the adult population of the United States were victims of violence or abuse motivated by prejudice during the previous twelve months. The acts involved included actual and threatened physical violence and destruction of property as well as direct, face-to-face insults. The traumatic effect of these acts was substantially greater than the trauma experienced by victims of similar attacks which were not motivated by prejudice. On a scale of nineteen, standard psychophysiological symptoms of stress, victims of ethnoviolence suffered, on average, 21% more of these symptoms than did victims of similar acts of ordinary violence or abuse (5.8 symptoms versus 4.8). Preliminary findings of a recently-completed study of a large corporate setting, funded by the National Institute of Justice, confirm the earlier studies and indicate that ethnoviolence is even more pervasive in the workplace than in the larger community.

NIAPV's research consistently finds that verbal and symbolic expressions of prejudice cause measurable and substantial trauma to their targets. Still, NIAPV has always held that most such expressions, as odious as they are, must be protected by the First Amendment if freedom of speech is to remain a central value of our society. For example, NIAPV believes that group defamation is protected by the First Amendment; and most face-to-face insults and slurs which do not amount to actual threats of violence or "fighting words" are also protected speech. In such cases it is our responsibility to understand who is paying the price to preserve the freedom of speech and

to take committed action in other areas to ameliorate the harmful effects on its victims.

Millions of Americans know firsthand the vicious harm inflicted by acts of ethnoviolence, and this is reflected in wide and strong support for the many so-called "hate crime" laws which have been enacted in the states. The recent uprisings in Los Angeles and other cities are truly the tip of a large and explosive iceberg of intergroup tensions and conflict. While the law alone cannot begin to solve these problems, nevertheless it has a critical role to play in combatting their most harmful manifestations. NIAPV believes that the ADL model "hate crime" statute represents a responsible and effective effort to combat ethnoviolent crimes while protecting the freedom of speech under the First Amendment.

For the reasons stated above, we join in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX K:

THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization for Jewish community relations in the United States, and consists of the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT, as well as 117 community member agencies representing Jewish communities throughout the United States (listed below).

As the national planning and coordinating body for the field of Jewish community relations, NJCRAC is dedicated to preserving and protecting the principles embodied in the Bill of Rights—particularly the First Amendment—and is equally committed to the counteraction of discrimination and bigotry in the society. The NJCRAC believes that this balancing of sometimes conflicting interests, in the larger context of constitutional protections, is an essential bulwark in maintaining the individual, group, and political equality of all Americans.

NJCRAC Constituent Organizations

National Agencies

American Jewish Committee
American Jewish Congress
B'nai B'rith/Anti-Defamation League
Hadassah
Jewish Labor Committee

Jewish War Veterans of the U.S.A.
National Council of Jewish Women
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of Conservative Judaism
Woman's League for Conservative Judaism
Women's American ORT

Community Agencies

Alabama

CRC of the Birmingham Jewish Federation

Arizona

CRC of the Greater Phoenix Jewish Federation
JCRC of the Jewish Federation of Southern Arizona

California

Jewish Federation of Greater Long Beach and West Orange County
CRC of the Jewish Federation-Council of Los Angeles
JCRC of the Greater East Bay
Jewish Federation of Orange County
JCRC of Sacramento
JCRC of United Jewish Federation of San Diego
JCRC of San Francisco, the Peninsula, Marin and Sonoma Counties
JCRC of Greater San Jose

Connecticut

Jewish Federation of Greater Bridgeport
Jewish Federation of Greater Danbury
Jewish Federation of Eastern Connecticut
CRC of Greater Hartford Jewish Federation
Jewish Federation of Greater New Haven
United Jewish Federation of Stanford
Jewish Federation of Waterbury

Delaware

Jewish Federation of Delaware

District of Columbia

Jewish Community Council of Greater Washington

Florida

Jewish Federation of South Broward
Jewish Federation of Fort Lauderdale
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Jewish Federation of Greater Orlando
Jewish Federation of Palm Beach County
Jewish Federation of Pinelas County
Sarasota-Mantes Jewish Federation
South Palm Beach County Jewish Federation

Georgia

Atlanta Jewish Federation
Savannah Jewish Federation

Illinois

JCRC of the Jewish Limited Fund of Metropolitan Chicago
Jewish Federation of Peoria
Springfield Jewish Federation

Indiana

Indianapolis JCRC
Jewish Federation of St. Joseph Valley

Iowa

Jewish Federation of Greater Des Moines

Kansas

(See Missouri)

Kentucky

Central Kentucky Jewish Federation
Jewish Community Federation of Louisville

Louisiana

Jewish Federation of Greater Baton Rouge
Jewish Federation of Greater New Orleans
Shreveport Jewish Federation

Maine

Jewish Federation Community Council of Southern Maine

Maryland

Baltimore Jewish Council

Massachusetts

JCRC of Greater Boston
Jewish Federation of North Shore
Jewish Federation of Greater New Bedford
Jewish Federation of Greater Springfield
Worcester Jewish Federation

Michigan

Jewish Community Council of Metropolitan Detroit
Flint Jewish Federation

Minnesota

JCRC/Anti-Defamation League of Minnesota and the Dakotas

Missouri

Jewish Community Relations Bureau/American Jewish Committee of Greater Kansas City
St. Louis JCRC

Nebraska

ADL/CRC of the Jewish Federation of Omaha

New Jersey

Federation of Jewish Agencies of Atlantic County
United Jewish Community Bergen County/North Hudson

Jewish Federation of Central New Jersey
Jewish Federation of Clinton-Passaic
MetroWest United Jewish Federation
Jewish Federation of Greater Middlesex County
JCRC Jewish Federation of North Jersey
JCRC of Southern New Jersey
Jewish Federation of Mercer and Bucks Counties

New Mexico

Jewish Federation of Greater Albuquerque

New York

Jewish Federation of Broome County
Jewish Federation of Greater Buffalo
Elmira Jewish Welfare Fund Jewish Federation of Greater Kingston
JCRC of New York
United Jewish Federation of Northeastern New York
Jewish Federation of Greater Orange County
Jewish Community Federation of Rochester
Syracuse Jewish Federation
Utica Jewish Federation

Ohio

Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
CRC of the Columbus Jewish Federation
JCRC of the Jewish Federation of Greater Dayton
CRC of the Jewish Federation of Greater Toledo
JCRC of Youngstown Area Jewish Federation

Oklahoma

Jewish Federation of Greater Oklahoma City
Jewish Federation of Tulsa

Oregon

Jewish Federation of Portland

Pennsylvania

CRC of the Jewish Federation of Allentown
Erie Jewish Community Council
CRC of the United Jewish Federation of Greater Harrisburg
JCRC of Greater Philadelphia
CRC of the United Jewish Federation of Pittsburgh
Scranton-Lackawanna Jewish Federation
Jewish Federation of Greater Wilkes-Barre

Rhode Island

CRC of the Jewish Federation of Rhode Island

South Carolina

Charleston Jewish Federation
Columbia Jewish Federation

Tennessee

JCRC of the Memphis Federation Council
Jewish Federation of Nashville and Middle Tennessee

Texas

Jewish Federation of Austin
Jewish Federation of Greater Dallas
JCRC of the Jewish Federation of El Paso
Jewish Federation of Fort Worth and Tarrant County
CRC of the Jewish Federation of Greater Houston
JCRC of the Jewish Federation of San Antonio

Virginia

United Jewish Community of the Virginia Peninsula
Jewish Community Federation of Richmond
United Jewish Federation of Tidewater

Washington

Jewish Federation of Greater Seattle

Wisconsin

Madison Jewish Community Council
Milwaukee Jewish Council

("CRC"—Community Relations Committee or Council; "JCRC"—Jewish Community Relations Council)

APPENDIX L:

THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES

The National Organization Of Black Law Enforcement Executives ("NOBLE") is a non-profit organization of police chiefs, agency heads, command-level law enforcement officials and criminal justice educators whose membership is numbered at approximately 2400. NOBLE's goals are to develop, implement and manage innovative ideas, concepts and programs aimed at reducing violence, crime, and the elimination of racism in the criminal justice arena. NOBLE was founded in September, 1976, during a three day symposium co-sponsored by the Police Foundation and the Law Enforcement Assistance Administration (LEAA).

Consistent with its motto, "Justice by Action," NOBLE aggressively pursues its goals by conducting substantive research, speaking out on the issues and performing a variety of outreach activities. NOBLE's success in this arena is reflected by its growth and the major role it has played, and continues to play, in shaping policy in areas of vital importance to minorities and the law enforcement community. NOBLE has effectively used the judicial process and direct correspondence to express opinions and concerns. NOBLE has endorsed strategies that provide a holistic approach to crime and violence and proactive policy-community involvement.

What has come to be known as hate violence, racial and religious violence and harassment was first researched by NOBLE in 1983. NOBLE received funding from the National Institute of Justice (NIJ) to do research on the problem and to develop model policies and procedures for law enforcement agencies.

As a result, NOBLE published a law enforcement handbook that outlines a model response to racial and religious violence which is used broadly by the law enforcement

community and social service practitioners. NOBLE provided education and advocacy that resulted in the passage of federal legislation requiring the collection of data on the occurrence of hate violence incidents. With a grant from the Ford Foundation, NOBLE has drafted a training program and produced a videotape for law enforcement workers on racial violence entitled *Hate Crime: a Policy Perspective* aimed at training police officers in effective procedures for handling hate crimes. In addition, NOBLE has developed a training curriculum to deal with cultural clashes on college campuses. The curriculum is designed to sensitize college administrators, students and law enforcement personnel to the issue of racism.

Consequently, NOBLE joins the ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX M:

THE POLICE EXECUTIVE RESEARCH FORUM

The Police Executive Research Forum ("PERF") is a national organization of police executives from large- and medium-sized jurisdictions dedicated to promoting progressive policing through research, education, debate and national leadership.

Because of our commitment to protecting all persons equally under the law and the devastation that hate crimes can wreak on victims and their communities, PERF believes that the police community should aggressively seek out and respond to bias crime incidents. One tool police in 31 states now have to combat hate crime is the penalty enhancement statute. Penalty-enhancement statutes send a strong message to the public that law enforcement authorities take hate crimes very seriously and that perpetrators will face considerable punishment. We believe that penalty-enhancement statutes, when used as part of a comprehensive approach to hate crime, are effective and important tools—tools that are now in question as a result of the ruling in *State v. Mitchell*.

APPENDIX N:

THE SOUTHERN POVERTY LAW CENTER

The Southern Poverty Law Center is a non-profit organization founded in 1971 to protect the rights of poor people and minorities. Its attorneys have litigated numerous human and civil rights cases in federal and state courts across the country, including cases focusing on racial and sexual discrimination, voting rights, capital punishment, and racial violence.

In 1979, the Center established the Klanwatch Project to monitor the activities of white supremacist organizations and individuals throughout the United States. Klanwatch has been instrumental in providing federal and state law enforcement authorities with substantial assistance in combatting and prosecuting hate crimes and has developed the largest intelligence base on white supremacist groups that exists in this country. Using that data base, the Center itself has brought many successful civil lawsuits against white supremacists groups and their members. *See, e.g., Berhanu* v. *Tom Metzger, et al.*, No. A-8911-07007 (Ore.Cir.Ct.) (civil section against the White Aryan Resistance and its leaders and agents for the beating death of an Ethiopian student in Oregon); *Person* v. *Miller*, 854 F.2d 656 (4th Cir. 1988) (criminal contempt proceeding against Klan members violating a court order against paramilitary activities); *McKinney* v. *Southern White Knights*, No. C87-565-CAM (N.D. Ga. 1988) (civil action against Klan groups and individuals for assaulting peaceful civil rights marchers); *Donald* v. *United Klans of America*, No. 84-0725 (S.D. Ala. 1987) (civil action on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association* v. *Knights of the Ku Klux Klan*, 518 F.Supp.993 (S.D. Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

The Southern Poverty Law Center is deeply concerned about the steady rise in hate crimes by various fringe

groups and white supremacist organizations. The Southern Poverty Law Center joins the ADL in urging the Court to reverse the decision in *Mitchell* and affirm the constitutionality of the Wisconsin hate crime law.

APPENDIX O:

THE UNION OF AMERICAN HEBREW CONGREGATIONS

The Union of American Hebrew Congregations (UAHC) is the Congregational arm of Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has consistently opposed hate crimes, generally, and anti-Semitism more particularly. It has likewise been a strong advocate for an expansive view of First Amendment Rights and Freedoms.

APPENDIX P:

PENALTY ENHANCEMENT STATUTES NATIONWIDE

STATE

California

Cal. Penal Code 190.2(a)(16) (West Supp. 1991)
Cal. Penal Code 302 (West 1988 & Supp. 1991)
Cal. Penal Code 422.6-7 (West 1988)
Cal. Penal Code 594, 594.3 (West 1988)
Cal. Penal Code 1170.8 (West 1985)
Cal. Penal Code 11410-11413 (West 1988 & Supp. 1991)
Cal. Civ. Code 51.7 (West 1982 & Supp. 1988)

Colorado

Colo. Rev. Stat. 18-9-113, -121 (West 1990 & Supp. 1991)

Connecticut

Conn. Gen. Stat. Ann. 46a-58 (West 1986)
Conn. Gen. Stat. Ann. 52-251b (West Supp. 1991)
Conn. Gen. Stat. Ann. 53-37a (West 1986)
Conn. Gen. Stat. Ann. 53a-40a, -181b (West 1986 & Supp. 1991)
Conn. Gen. Stat. Ann. 29-7m (West 1988)

Florida

Fla. Stat. Ann. 806.13 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 871.01-.03 (West 1975 & Supp. 1991)
Fla. Stat. Ann. 876.17-.19 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 775.0845, -.085 (West 1976 & Supp. 1991)
Fla. Stat. Ann. 877.19 (West 1976 & Supp. 1991)

Idaho

Idaho Code 18-6201, -7901 to -7904 (1987)
Idaho code 67-2905 (1989)

Illinois

Ill. Ann. Stat. ch. 38, 12-2(2), 7.1 (Smith-Hurd Supp. 1991)

Ill. Ann. Stat. ch. 38, 21-1.2 (Smith-Hurd Supp. 1991)
Ill. Ann. Stat. ch. 38, 1005-5-3.2 (Smith-Hurd 1982 & Supp. 1991)
Ill. Ann. Stat. ch. 127, 55a (Smith-Hurd Supp. 1991)

Iowa

Iowa Code Ann. 729.5 (West 1991 & Supp. 1991)

Maryland

Md. Ann. Code art. 88B, 9-10 (1985 & Supp. 1990)
Md. Ann. Code art. 27, 10A (1988)
Md. Ann. Code art. 27, 470A (1988 & Supp. 1990)

Massachusetts

Mass. Ann. Laws ch. 6, 116B (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 6, 16-19 (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 265, 39 (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 266, 98 (Law Co-op. Supp. 1980)
Mass. Ann. Laws ch. 266, 127A (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 266, 128B (Law Co-op. Supp. 1991)
Mass. Ann. Laws ch. 272, 38 (Law Co-op. 1980)

Michigan

Mich. Comp. Laws Ann. 752-525 (West 1991)
Mich. Comp. Laws Ann. 750.147b, .217, .396 (West 1991)

Minnesota

Minn. Stat. Ann. 609.2231, .28, .5531, .595, .605, .735, .795 (West 1987 & Supp. 1991)

Missouri

Mo. Ann. Stat. 79.450 (Vernon 1987)
Mo. Ann. Stat. 574.085, .090, .093 (Vernon Supp. 1991)

Montana

Mont. Code Ann. 45-5-221 to -222 (1989)

Nevada

Nev. Rev. Stat. Ann. 83.130 (Michie 1991)
Nev. Rev. Stat. Ann. 201.270 (Michie 1986)
Nev. Rev. Stat. Ann. 206.125 (Michie Supp. 1989)
Nev. Rev. Stat. Ann. 207.185 (Michie Supp. 1989)

New Hampshire

N.H. Rev. Stat. Ann. 651.6 (1986 & Supp. 1990)

New Jersey

N.J. Stat. Ann. 2C:12-1 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:33-4, -9 to -11 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:43-7 (West 1982 & Supp. 1991)
N.J. Stat. Ann. 2C:44-3 (West 1982 & Supp. 1991)

New York

N.Y. Civil Rights 40-c to -d (McKinney Supp. 1991)
N.Y. Penal Law 240.21, .30, .31 (McKinney 1989)
N.Y. Penal Law 155.30(9) (McKinney Supp. 1991)
N.Y. Penal Law 165.45(6) (McKinney Supp. 1991)

Ohio

Ohio Rev. Code Ann. 2909.05 (Baldwin 1990)
Ohio Rev. Code Ann. 2927.11-.12 (Baldwin 1990)

Oklahoma

Okla. Stat. Ann. tit. 21, 850 (West 1991)
Okla. Stat. Ann. tit. 21, 914-915 (West 1983)
Okla. Stat. Ann. tit. 21, 1765 (West 1983)
Okla. Stat. Ann. tit. 21, 1301-1303 (West 1983)

Oregon

Or. Rev. Stat. 30.190, .200 (1988)
Or. Rev. Stat. 166.075, .155, .165 (1990)
Or. Rev. Stat. 181.550 (1991)

Pennsylvania

18 Pa. Cons. Stat. Ann. 2710 (Purdon 1983)

18 Pa. Cons. Stat. Ann. 3307 (Purdon 1983 & Supp. 1991)
18 Pa. Cons. Stat. Ann. 5509 (Purdon 1983 & Supp. 1991)
71 Pa. Cons. Stat. Ann. 250(i) (Purdon 1990)
71 Pa. Cons. Stat. Ann. 251 (Purdon 1990)

Rhode Island

R.I. Gen. Laws 9-1-35 (1985)
R.I. Gen. Laws 11-11-1, -42-3, -44-31, -53-1 to -2 (1981 & Supp. 1990)
R.I. Gen. Laws 42-28-46 (1988)

Vermont

Vt. Stat. Ann. tit. 13, 1454-1457 (Supp. 1990)

Washington

Wash. Rev. Code Ann. 9.61.160, .180 (West 1988)
Wash. Rev. Code Ann. 9A.36.080 (West 1988 & Supp. 1991)

West Virginia

W.Va. Code 61-6-13, -21, -22 (1989)

Wisconsin

Wis. Stat. Ann. 895.75 (West 1983 & Supp. 1990)
Wis. Stat. Ann. 939.641, .645 (West 1982 & Supp. 1990)
Wis. Stat. Ann. 943.012 (West 1982 & Supp. 1990)

Distict of Columbia

D.C. Code Ann. 22-1114 (1989)
D.C. Code Ann. 22-3112.2 to -3112.4 (1989)
D.C. Code Ann. 4001-4004 (Supp. 1991)